

07-04 MPT Example 1

To: William Drake, SECA attorney

From: Applicant

Re: Dr. Marian Bonner

I am writing to you with regards to SECA's involvement with Dr. Marian Bonner's materials. Our client, Dr. Nicole Hall, is Dr. Bonner's daughter and rightful heir. Please carefully review the following material as the actions of SECA have infringed upon copyright laws and have violated a right to privacy.

I. Description of the Dispute

On July 22, 2004, SECA announced in a press release and news conference that it acquired previously unknown materials of value drafted by Dr. Bonner. The unauthorized use of these materials infringes upon copyright infringement law and also violates Dr. Bonner's right to privacy, as transferred in ownership to Dr. Hall, her daughter.

Copyright Infringement

Under the United States Code, Section 102, copyright protection exists to protect "original works of authorship fixed in any tangible medium of expression," including literary works. Under Section 107, there are 4 factors that the court uses to determine if there has been an infringement: 1) The purpose and character of the use (specifically whether use is for a commercial nature); 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used in relation to the whole; and 4) the effect of the use on the potential market or value of the copyright. These four factors have been described and affirmed in the Supreme Court decision of *Campbell* in 1994.

The works must be evaluated under this four-prong test. Specifically under the fourth prong, when a commercial use amounts to a duplication of the original, it is a "market replacement" that makes it likely that harm will occur. (Citing *Campbell*). The court also weighs factors such as whether the work is transformative, thereby using the old work to generate new, creative works that benefit society. While there is a Fair Use affirmative defense to copyright infringement, the only other exceptions are articulated in Section 107 which include the following (emphasis included): "criticism, comment, news reporting, TEACHING (INCLUDING MULTIPLE COPIES FOR CLASSROOM USE), scholarship, or research. Otherwise, any infringement that reproduces the work "in copies" or "distribute[s] copies . . . of the original work to the public by sale or other transfer of ownership" are blatantly illegal. (Citing USC, Section 106).

Right to Privacy

Under USC Section 201, copyright in a work is protected under ownership rights. A transfer of

ownership of a copyright may be transferred by any means of conveyance. This includes any privacy rights passed via will or through personal property to heirs.

In *Bolen Products*, the Supreme Court of Franklin held that a private citizen, entertainer, or public figure may sue under the tort for right of publicity. Although the right is not absolute, the court also held that the right of publicity may survive the death of its owner and is inheritable. The court paid particular attention to those situations where an "unauthorized exploitation a public person would be used for "commercial purposes." A perpetrator will be convicted if the commercial purposes do not serve a "significant public purpose."

II. Statement of Facts

In this case, Dr. Nicole Hall is the rightful heir of Dr. Bonner's estate. Hall received all of Bonner's personal property, including her personal papers and copyright in those papers. Therefore, under Section 201, Hall has a legitimate legal right and interest in Bonner's works.

SECA has publicly declared that it will reveal many letters, speeches, and journals penned from Dr. Bonner's hand. Additionally, SECA plans on making a name change to the "Marian Bonner Educational Group." SECA wants to publish and distribute Bonner's excerpts and eventually sell the materials to collectors. There is a strong connection between SECA's publication of Bonner's documents and its commercial gain at the direct expense of Dr. Nicole Hall, her daughter.

III. Rationale

A. Copyright Infringement

As outlined previously, USC Section 107 of Copyright Act outlines four factors to be determined in evaluating whether there is a copyright infringement. While one factor is not dispositive, a violation of all factors will render an unfavorable decision. The Supreme Court has expanded upon these factors, all of which SECA has violated.

1) Purpose and Character of the use. According to the Supreme Court, if the work is more creative, or transformative, it will be considered less of an infringement. Additionally, the fact that a publication was commercial v. non-profit weighs into the determination.

In this case, SECA is planning on reproducing materials to all state legislators. There will be a small volume of the excerpts that stress the need for attention for the individual needs of the students. These are direct excerpts that will be reproduced, hardly providing a transformative element for the betterment of society.

2) Nature of the copyrighted work. Here, the court values the fact that a work is published. Although Bonner's 300 letters, 50 handwritten speeches, 10 volumes of journals are unpublished, her other works, such as the Discrimination, Public Education, and Democracy, are very much published. Simply because something is unpublished does not negate her recovery. Her recognition as a public figure, especially considering her national appeal as "The Great Educator"

makes her name itself an enormous recognizing factor.

3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole. In this prong, the court analyzes the significance of the work and asks if the reproduction pertains to "the heart of the book." Here, the SECA is planning on publishing letters verbatim and also selling works verbatim. This is a clear violation of this prong as the works themselves go to the "heart of the matter" of her teachings and thoughts.

4) Effect of use upon the potential market for or value of the copyrighted works. Here, the court will balance the effect of the copyright on the market. This prong is the one that SECA clearly violates.

SECA is a major for-profit educational provider, using Bonner's works to advance its commercial goals. The SEC is marking a name change: "Rediscovering Marian Bonner's Legacy," basing this name change off of her publications. After doing this, SECA, a for-profit organization, will sell the materials to collectors. It is postured that SECA will sell materials in separate units, dispersed in various sites across the country and may be inaccessible on a restricted basis. As a result, this distribution is becoming a large-scale commercial operation.

SECA is not only profiting from Bonner's name and writings, but also changing its corporate name. The transformative nature of this is minimal since the works are copied verbatim and SECA plans to use the materials for its commercial gain.

B. Violation of the Right to Publicity

As discussed previously, USC Section 201 provides that Dr. Hall, as Dr. Bonner's daughter and heir, has the right to assert a claim for the right of publicity. Dr. Hall has received, via will, not only all of Dr. Bonner's personal papers, but also the copyright to those papers. According to Bolen Products, relatives of the deceased may "protect the memory of their kinsman, not only from defamation, but also from an unconsented-to-invasion." Therefore, in Franklin, the tort of violation of right to publicity is violated, and Hall has standing to sue.

Regardless if Bonner is considered to be a private figure or a public figure, Hall has the right to sue. The Bolen Product court is clear that it can be either of the two categories. Additionally, the court emphasized that the right to publicity of a public figure survives his or her death if the unauthorized exploitation of that public figure for commercial purposes, and if that would not serve to reward or encourage effort and creativity that serve "some significant public purpose."

In this case, SECA is not benefitting a "significant public purpose." Rather, SECA is using Bonner's works for its own commercial exploitation. The works could be displayed in conjunction with Bonner's works at the Franklin Library Association. Or the works could be held by the rightful heir, Dr. Hall, as she best sees fit. However, there is no significant public purpose achieved by reproducing 300 letters, 50 handwritten speeches, and 10 volumes of journals to be given to state legislators, sold to collectors, and distributed across the nation.

Conclusion

Thank you for your consideration in this matter. Per statutory and case law, SECA has violated two laws: laws of copyright infringement and the tort for invasion of privacy. I welcome the opportunity to speak with you further regarding these matters and providing Dr. Hall with the satisfaction that these problems will not occur in the future.

07-04 MPT Example 2

July 27, 2004

Mr. William Drake
Attorney and Associates
1234 Lawyer Lane
Anytown, Franklin 33333

In re Marian Bonner

Dear Mr. Drake:

I am writing on behalf of the estate of Dr. Marian Bonner, by her daughter Dr. Nicole Hall, to demand that the Success for Every Child Association (SECA) cease and desist any and all actions, publications, announcements, or plans that include the name or works of Dr. Marian Bonner. Failure to do so will infringe on copyrights held by Dr. Hall and will violate her right to publicity.

As you are probably aware, Dr. Bonner was for more than forty years a nationally known advocate for change in the public school system. Considered by many to be an expert on public education, she authored many papers, letters, journals, and speeches. As explained below, copyright and rights of publicity in these writings passed to Dr. Hall upon the death of Dr. Bonner.

While recognizing that SECA maintains physical possession of certain papers, and without consenting that such possession is lawful, it is our position that SECA's use of these papers will infringe upon and violate these rights. In fact, SECA may have already violated the right to publicity by announcing plans to change its name and publish papers.

Section 102 of the Copyright code provides that copyright protection exists "in original works of authorship fixed in any tangible medium of expression." Section 102 expressly provides that literary works are a fixed tangible medium.

Section 106 provides that the owner of the copyright has "exclusive rights" in regard to certain actions, including reproduction of the copyrighted work, distribution of copies to the public, and, in the case of literary works, public display of the work.

Section 201 provides that copyright vests originally in the author of the work, but that ownership of the copyright may be transferred entirely through will or intestate succession.

Per these sections, Dr. Bonner enjoyed exclusive copyright protection in her original written works, some of which SECA now possess. Per Section 201, the transfer of Dr. Bonner's copyright

to Dr. Hall through probate of Dr. Bonner's will.

Dr. Hall, then, owns copyright to the papers in question exclusively. Section 501 provides that "anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright." While Section 107 provides limitations on exclusive rights, none of the factors delineated lead to the conclusion that SECA's purported use is fair under Section 107.

The four statutory factors are: the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work.

In *Campbell v. Acuff-Rose Music, Inc.*, United States Supreme Court (1994), the Court provided a framework for analyzing the four factors to be considered in determining whether use is fair under Section 107 while undertaking a determination of the status of parody songs under copyright law.

The court begins by pointing out that the purpose of copyright law, and the fair use doctrine, specifically, is to promote and foster creativity.

As to the first factor, purpose and character of use, the Court in *Campbell* inquires into whether the use "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." Clearly, SECA's purported use fails the first factor. SECA's use claims to add nothing new or different to the writings of Dr. Bonner - in fact, SECA's use is nothing more or less than word-for-word usage of portions of Dr. Bonner's work.

Section 107 also includes in the first factor an inquiry into whether the use is of a commercial nature or for nonprofit educational purposes. In the case at hand, the use would be to raise money and publicity for SECA, and is therefore of a commercial nature, even though SECA claims to be interested in education. The purported use of Dr. Bonner's works would be to advance SECA, not education, as SECA is a for-profit association and would not be using the works as a means of education.

After noting that the additional three factors will be of greater importance if a new use adds nothing to the original, the court undertakes the second factor under Section 107: the nature of the copyrighted work. The court notes that the closer the new use comes to "the core of intended copyright protection" and therefore "fair use is more difficult to establish when the former works are copied." The court then provides an example: "If a work is unpublished, that is 'a key, although not a determinative factor,' weighing heavily against a finding of fairness." That is exactly the situation in *re Marian Bonner*. SECA's purported use is to provide exact copies, in whole or in part, of Dr. Bonner's unpublished works.

In discussing the third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, the court states that "a work composed primarily of an original,

particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original." This statement is made after the Court discusses Harper & Row, where use of only 300 words was sufficient for a finding of unfair use when the 300 words were deemed "to amount to the heart of the book." In this case, SECA's work would be composed entirely of an original writing, with no additions or changes.

The fourth factor under section 107 is the effect of the use upon the potential market for or value of the copyrighted work. The court states, "When a commercial use amounts to mere duplication of the entirety of an original, it serves as a market replacement for it, making it likely that cognizable market harm to the original will occur." Again, SECA's purported use is to produce duplications, in whole or in part, of previously unpublished works. This would significantly effect the copyright holder's market to do the same.

SECA's purported use fails to qualify as a "fair use" under Section 107 as a whole, and individually under each of the four factors. Since such use is not fair, it would violate Dr. Hall's rights as copyright holder and would be an actionable infringement.

Further, SECA's actions violate Dr. Hall's right to publicity of the likeness and name of her mother, Dr. Bonner. The Supreme Court of Franklin held in *Martin Luther King, Jr., Center for Social Change, Inc. v. Bolen Products Inc.*, Franklin Supreme Court (1982), that "the appropriation of another's name and likeness without consent and for financial gain is a tort in Franklin, whether the person whose name and likeness is used is a private citizen, entertainer, or public figure."

In the same decision, the Court also held that "in Franklin, the right of publicity of a public figure survives his or her death if the unauthorized exploitation of that public figure for commercial purposes would not serve to reward or encourage effort and creativity that serve some significant public purpose."

SECA's use of Dr. Bonner's name has already infringed upon Dr. Hall's right to publicity in the name and likeness of Dr. Bonner, and continued use of Dr. Bonner's name will continue to violate that right. SECA is and will be liable to Dr. Hall for damages in the amount of the value of the use of Dr. Bonner's name to SECA.

The copyright laws are clear, as are the decisions of the courts in *Campbell* and *Center*. SECA's use violates the copyright and right of publicity that Dr. Hall holds. Failure to cease and desist infringement and violation of these rights immediately will result in action for damages.

Please advise us of how you intend to handle this matter.

Sincerely,
Associate Attorney

07-04 MPT Example 3

Andrews, Ewing & Oakman
1656 Barrington Boulevard
Cascade, Franklin 33339

July 27, 2004

Mr. William Drake
SECA
123 Elm Street
Cascade, Franklin 33339

Dear Mr. Drake:

My client, Dr. Nicole Hall, Dr. Marian Bonner's daughter, wishes to stop SECA's unauthorized use of her deceased mother's writings and name. SECA's proposed actions threaten to infringe on Dr. Hall's copyright in her mother's materials and violate her right of publicity. Because SECA's use clearly would not constitute a fair use and use of her name would violate Dr. Hall's right to publicity, I am hoping we can settle this without resort to court proceedings.

Background

As you know, Dr. Marian Bonner was a prominent and devoted educational reformer here in Franklin. Throughout her career, Dr. Bonner remained committed to reforming public schools and documented her efforts by writing numerous letters, speeches and journals. Upon her death, Dr. Bonner left her entire estate, including all her writings, to her daughter, Dr. Hall. In cleaning out Dr. Bonner's house after the funeral, Dr. Hall's distraught niece inadvertently misplaced the papers.

As you are also aware, SECA has come into possession of these writings and intends to publish and sell the writings. In addition, SECA plans to change its name to the Marian Bonner Educational Group.

Because Dr. Hall was unaware that her deceased mother's writings were misplaced, it obviously comes as a tremendous shock to hear of these plans. Like her mother, Dr. Hall is devoted to academic research and would like to personally ensure that the writings be used in a manner in which her mother would have wanted.

Legal Analysis

Fair Use

Under the Copyright Act of 1976, a copyright vests initially in the author of a work and the ownership of a copyright may be bequeathed by will. 17 U.S.C. §201. In this case, Dr. Bonner bequeathed everything to her daughter who is, therefore, the owner of the copyright. The owner of a copyright has the exclusive rights as to the copyright subject to the limitations of the fair use doctrine. 17 U.S.C. §107. The fair use doctrine allows courts to avoid strictly applying the copyright statute in the interest of fostering creativity. *Campbell*. The court considers four factors: (1) purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. §107.

The first factor, purpose and character of the use, inquires whether and to what extent the new work is transformative, meaning that the new work has a further purpose or different character. *Campbell*. In addition, the fact that a use is commercial weighs against a finding of fair use. *Campbell*. In this case, the republication of Dr. Bonner's writings has no further purpose and does not add any different character. The proposed publication would be an exact replication, rather than a commentary or criticism. Furthermore, the distribution is intended to help secure contracts with the state, a commercial purpose. The first factor, then, disfavors any fair use defense.

The second factor, the nature of the copyrighted work, recognizes that some works deserve greater protection as they are "closer to the core of intended copyright protection." *Campbell*. For example, the fact that a work is unpublished is a factor that may entitle it to greater protection. *Id.* Because Dr. Bonner's works are unpublished, copyright protection will more likely be granted. In addition, court's grant greater protection to creative works. *Id.* Dr. Bonner's works, although examinations of fact, contain her views and approaches, which would be considered creative. Thus, the second factor also weighs against fair use.

The third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, examines whether the use is "reasonable in relation to the purpose of the copying." *Campbell*. Where the work is copied verbatim, the use is usually not viewed as reasonable because it is not transformative in nature. *Id.* In this case, SECA plans to republish verbatim Dr. Bonner's works. Clearly, the third factor weighs heavily against a finding of fair use.

The final factor considers the effect of the use upon the potential market for or value of the copyrighted work. "When a commercial use amounts to a mere duplication of the entirety of an original, it serves as a market replacement for it, making it likely that cognizable market harm to the original will occur." *Campbell*. This is exactly the situation with SECA's proposed publication of Dr. Bonner's writings. After distributing exact republications to legislators, SECA will procure more contracts with the state, a commercial use. Therefore, SECA's plans also fail as a fair use under the fourth factor.

Right of Publicity

A right of publicity is "a celebrity's right to the exclusive use of his or her name and likeness." *MLK, Jr.* In *Arnold Palmer Enterprises*, the court stated that although material about a person may be widely disseminated, use of that information "for the purpose of capitalizing upon the name by using it in connection with a commercial project other than the dissemination of news or articles or biographies" violates the right of publicity. In this case, SECA plans to use Dr. Bonner's name as its own, which will lend more credibility to the organization and help further its commercial purposes. Moreover, the information SECA plans to use is not widely disseminated. If widely disseminated information cannot be used in conjunction with the name for commercial purposes, certainly information that has not been disseminated at all cannot be used for that purpose.

The court has also held that this right of publicity may sometimes survive the death of the owner. "The right of publicity of a public figure survives his or her death if the unauthorized exploitation of that public figure for commercial purposes would not serve to reward or encourage effort and creativity that serve some significant purpose." *MLK, Jr.* Although republication would allow many people to see Dr. Bonner's work, that is not the purpose for which SECA intends to use it. SECA hopes to secure additional contracts from the state rather than to further Dr. Bonner's goals. Furthermore, it is not necessary that the owner have commercially exploited the right before it can survive. *Id.* Therefore, the right to publicity survives Dr. Bonner's death and passes to her daughter, Dr. Nicole Hall.

As the above analysis clearly demonstrates, SECA cannot possibly defend on the basis of fair use or an argument that the right of publicity did not exist or survive Dr. Bonner's death. As such, I am hoping that we can speedily settle these matters. I look forward to hearing from you soon.

Sincerely,

Denise Samuels